Editor's note: Reconsideration granted; decision vacated -- See State of New Mexico (On reconsideration), 50 IBLA 367 (Oct. 21, 1980)

STATE OF NEW MEXICO

IBLA 75-582 Decided March 8, 1976

Appeal from decision of New Mexico State Office, Bureau of Land Management, rejecting indemnity school land application NM 18723.

Set aside and remanded.

1. Lieu Selections -- School Lands: Indemnity Selections

   An application by a State for an indemnity school land selection is not subject to jection for the sole reason that the base lands are less valuable than the selected lands.

2. Lieu Selections -- School Lands: Indemnity Selections

   When a State files an indemnity school land application and selects lands withdrawn for leaseable minerals and it is determined that disposal of such lands would unreasonably interfere with operations under the mineral leasing laws, such application may be rejected. However, when the State offers to waive the reserved leaseable minerals and to allow reasonable surface entry for development and removal of the minerals, the application should be reevaluated in light of such offer.

APPEARANCES: Phil R. Lucero, Commissioner of Public Lands, State of New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On June 5, 1973, the State of New Mexico filed an indemnity school land application, NM 18723, with the New Mexico State Office, Bureau of Land Management. Such application was filed under the

provisions of Sections 2275 and 2276 of the Revised Statutes, as amended by the Act of August 27, 1958, 43 U.S.C. §§ 851 and 852 (1970). The State sought to select the land described as lots 3, 4, 5 and 6, Sec. 6, T. 21 S., R. 33 E., N. Mex. Prin. Mer., New Mexico, in lieu of, or as indemnity for, the corresponding school lands, or losses to its grant for common schools. Such base lands were relinquished by Relinquishment Deeds 3120, 3130 and 1256 and described as follows:

T. 11 N., R. 27 E., N. Mex. Prin. Mer., New Mexico
Sec. 12, Part of SE 1/4 SE 1/4
Sec. 13, lot 4, NE 1/4 NW 1/4

T. 12 N., R. 29 E., N. Mex. Prin. Mer., New Mexico
Sec. 22, lots 1 and 2.

The selected lands and the base lands each totaled 148.47 acres.

By decision dated April 23, 1975, the State Office, BLM, stated that the United States Geological Survey (USGS) had reported that the base lands were valuable for oil and gas. The USGS also reported that the selected lands were valuable for oil and gas and were in an area of active oil and gas production. The decision stated that the South Salt Lake Known Geologic Structure (defined and undefined additions) was located in a section adjacent to the selected land, and that the Lynch KGS was in Section 2 of T. 21 N., R. 33 E. The selected lands were also included in E.O. Withdrawal NM 1, Potash Reserves of March 11, 1926.

The decision informed the State that the USGS reported "that the exercise of surface rights on the selected land would interfere unreasonably with operations under the mineral leasing laws."

The BLM concluded that "in view of the above facts" the application is rejected.

The Commissioner of Public Lands for the State of New Mexico responded by letter dated May 19, 1975, enclosing a Mineral Waiver offering to amend its application so as to reserve to the United States all the potash and sodium minerals in the selected lands, he pointed out that under the standard mineral reservation clause the United States retains the right to use so much of the surface as may be reasonably necessary for the prospecting and mining of such mineral. Also he requested that the April 23, 1975, decision be rescinded.

By letter dated May 23, 1975, the Acting State Director, BLM, citing 43 CFR 2093.0-3(a), 1/ stated that the BLM could not accept a mineral waiver and rescind the April 23 decision. The Acting State Director also pointed out the Department's policy regarding land selections by the States when the value of the selected lands greatly exceeds the value of the base lands. This policy was termed the "grossly disparate values policy" and the Acting State Director concluded that:

> * * * While the land values have not been precisely determined, it appears that the selection involves land of grossly disparate values within the meaning of the Department's policy.

On appeal the Commissioner asserts that the BLM decision was arbitrary and should be reversed. He argues that the "lost" lands and the "selected" lands are mineral in character and that the State is entitled to select mineral land so long as it is not in a producible status. For a definition of producible status, he directs our attention to Solicitor's Opinion, M-36626, September 8, 1961. He states that the selected lands are not in a producible status and, therefore, the State is entitled to such lands. He also again offers to waive the potash together with allowing surface use by the Federal government to prospect and remove the potash.

[1] The BLM letter of May 23, 1975, to the Commissioner attempts to assign an additional ground for rejection of the application by making reference to the "grossly disparate value" policy. 2/

1/ 43 CFR 2093.0-3(a) reads as follows:

"(a) Section 29 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 449; 30 U.S.C. 186) and the act of March 4, 1933 (47 Stat. 1570; 30 U.S.C. 124) grant the Secretary of the Interior complete discretion to determine whether the surface of public lands embraced in mineral permits or leases, or in applications for such permits or leases, or classified, withdrawn, or reported as valuable for any leasable mineral, or lying within the known geologic structure of a field, should be disposed of. Accordingly, where a nonmineral application is filed, in the continental United States, for any of such described lands, the nonmineral application may be allowed only if it is determined by the proper officer, with the concurrence of the Director, Geological Survey, that the disposal of the lands under the nonmineral application will not unreasonably interfere with current or contemplated operations under the Mineral Leasing Acts. Appeals from any decision of the Director, Bureau of Land Management, or other officer, may be taken by any affected party in accordance with Parts 1840 and 1850 of this chapter."

2/ This Board has been unable to identify the policy to which the decision refers.

However, it is clear that a mere discrepancy in value, even though such discrepancy might be substantial, is not a sufficient ground, standing alone, on which to base a rejection of such an application. Solicitor's Opinion, M-36351 (June 19, 1956); Stephen Blaine Hailstone, A-25889 (August 24, 1950).

Since such a ground is not sufficient in its own right, we must examine the other reasons cited in the April 23, 1975, decision.

Pursuant to 43 U.S.C. § 852 (1970), a State may make indemnity selections from any unappropriated, surveyed public lands within the State or Territory where such losses occur, subject to three restrictions:

> 1. The State may select lands mineral in character only to the extent that the lands "lost," or in this case relinquished, are mineral in character.
>
> 2. The right to select mineral lands is further restricted in that where the selected lands are on a known geologic structure of a producing oil or gas field, it is necessary that the base lands also be on such a known geologic structure.
>
> 3. Land subject to a mineral lease or permit may be selected only if none of the land subject to that lease or permit is in a producing or producible status.

Appellant urges that the selected lands herein are not in a producing or producible status and has cited Solicitor's Opinion, M-36626 (September 8, 1961), 70 I.D. 82. The construction given to "lands in producible status" in such opinion was subsequently rejected in Solicitor's Opinion, M-36645 (December 17, 1962), 70 I.D. 71. However, in an Attorney General's Opinion dated February 7, 1963, 70 I.D. 65, Attorney General Kennedy espoused the views set forth in the original Solicitor's Opinion, M-36626.

Regardless of these facts, examination of the record herein reveals no outstanding leases or permits on the selected lands, thus distinguishing this case from the situation which prevailed in State of California, A-26530 (July 15, 1953). Therefore, we find that the restriction imposed by 43 U.S.C. § 852(a)(3) does not apply in this case. Nor does the condition found in 43 U.S.C. § 852(a)(2) apply because neither the base lands nor the lieu lands herein are on a known geologic structure of a producing oil or gas field.

The restriction in 43 U.S.C. § 852(a)(1) is satisfied in that both the selected lands and the base lands are mineral in character. However, the selected lands are also subject to a withdrawal for potash. Therefore, 43 CFR 2093.0-3(a), supra, must be considered. According to such section, the Secretary has complete discretion to determine whether there should be disposition of the surface of lands withdrawn for a leaseable mineral. And when an application such as the one herein is filed, it may be allowed only if it is determined by the proper officer, with the concurrence of the Director, USGS, that the disposal of the lands under the nonmineral application will not interfere with current or contemplated operations under the Mineral Leasing Act, 30 U.S.C. § 181 et seq. (1970).

The April 23, 1975, BLM decision stated that the USGS had reported that the exercise of surface rights on the selected land would unreasonably interfere with operations under the mineral leasing laws. However, there could be no such interference if title to the land and all leaseable minerals passed to the State.

Were it not for the fact that the land is subject to a withdrawal for its potash content, we would be constrained to hold, on the basis of the Attorney General's Opinion, supra, that the land is subject to selection by the State without a waiver or restriction of the potash to the United States. But because the withdrawal was specially promulgated to reserve the potash in this land to the United States, we must conclude that it is not available for transfer to the State, and will not become available unless and until the withdrawal is revoked.

This is apparently the only obstacle to the approval of the application, and the State has offered a potash waiver and to allow surface use of the land by the United States to the extent necessary to develop and remove the potash thereon. We do not find that acceptance of such a waiver is barred by 43 CFR 2093.0-3(a), as indicated by the State Director. 3/

3/ Moreover, we have considerable doubt whether 43 CFR 2093.0-3(a) has any relevance at all in this situation, as it is concerned with the criteria under which a disposition or use of the surface of mineral land may be allowed in response to a nonmineral application. Where, as here, the State is applying to select mineral lands as indemnity for mineral lands "lost" to it, we doubt that such an application can be properly characterized as a "nonmineral application" to acquire that "surface." In view of our holding, however, it is unnecessary to decide this point.

For that reason this case will be returned to the State Office so that appellants' offer may be considered and the application reevaluated in light of the discussion herein.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joseph W. Goss
Administrative Judge